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COMPARATIVE LAW, UNIFICATION AND SCHOLARLY CREATION
OF A NEW *IUS COMMUNE*†

I

A major theme of legal scholarship has been the unification of law. With the rise of the modern nation state this theme tended to concern unification of law within one nation. As a reaction to the rise of the nation state and the aggressive tendencies of such nation states, towards the end of the nineteenth century, international unification of law became a popular preoccupation. In this century, the experience of two world wars has indicated the difficulties of such unification, given the basic political instability of the nation state system,¹ while, for some writers, increasing the desirability of unification.

The founding fathers of modern comparative law took unification of law around the world as a basic aim of comparative law. Adopting a nineteenth-century epistemology of science and social science, they argued that analysis of the varying national laws would help demonstrate or indicate a universal common law of all mankind, thus permitting the elimination of national contingencies and the propounding of a "*droit idéal relatif*".² The founding fathers regarded unification of law as *the* task of comparative law—

*Le droit comparé est la branche spéciale de la science juridique qui a pour objet le rapprochement systématique des pays civilisés.*³

This consensus as to the nature and purpose of comparative law has been lost, and the past eighty years have seen endless debate over the nature and purpose of comparative law,⁴ over the name "comparative law" itself,⁵ and over whether comparative law is a "science" or a "method".⁶

† An essay-review.

1 On this see, e.g., Poggi, *The Development of the Modern State* (1978), 86–116, and especially pp. 90–92, where he discusses the instability of the system of states.

2 I am thinking here of the views propounded at the 1900 World Congress of Comparative Law by, most notably, Saleilles and Lambert, on which see, e.g., Gutteridge, *Comparative Law. An Introduction to the Comparative Method of Legal Study and Research* (1971, reprint of 1949 Cambridge edition), 18–19. These thinkers were very much under the influence of nineteenth-century sociology (especially that of Comte) and of biology. Saleilles once stated that: "*L'unification progressive est la loi de tout ce qui évolue, et le droit est — voie constante d'évolution. . .*" See "*La fonction juridique du droit comparé*," *Rechtswissenschaftliche Beiträge (Juristische festgabe des Auslandes zu Josef Kohlers 60 Geburtstag 9 März 1909)* (1909), 164–175, at p. 167. See further, Schmitthoff, "The Science of Comparative Law" (1939) 7 *C.L.J.* 94, 107–109.

3 Lévy-Ullman, found quoted in Lee, "Comparative Law and Comparative Lawyers" [1936] *J.S.P.T.L.* 1, 3.

4 See, e.g., Gutteridge, *op. cit.*, ch. 1, and Watson, *Legal Transplants: An Approach to Comparative Law* (1974), ch. 1.

5 Should the common English term or the French *droit comparé* or the Spanish *derecho comparado* be replaced by a term analogous to the German *Rechtsvergleichung*? See Watson, *op. cit.*, p. 1 and his note 2 thereon.

6 See, e.g., Schmitthoff, *op. cit.*; Watson, *op. cit.*, pp. 1–2. Watson points out that this debate has often turned into a debate about language. For an elegant argument in favour of comparative law being a science, see Constantinesco, L.J., *Traité de Droit Comparé, Vol. I, Book III* (1972) ch. 2 (translation from the German).

René David, as is fitting for one who once worked for *Unidroit*, has devoted much attention to unification of laws.⁷ David, in his many writings, does not explicitly consider the nature of comparative law as *such*: in fact, he does not believe that comparative law as *an autonomous discipline* exists; only the comparative method, which he considers to have varying uses, one of them being international unification of law.⁸ As Watson has rightly pointed out, David does not explain what the comparative method is: he assumes it is obvious.⁹

For much of this century, it has been thought that the way to effect international unification of law is through the activities of various bodies which transcend national legal systems. International conventions, adopted and ratified by member states, were intended to result in unification. The legislative activities of the various organs of the European Economic Community are intended to have a unifying effect on the laws of member states.¹⁰ In an essay entitled "The Methods of Unification", René David considered the use of international conventions (and the like) in the unification of law, and concluded that insufficient progress had been made.¹¹ He argued for other methods to be used to unify law. He propounds essentially the same view in his chapter entitled "The International Unification of Private Law" in the second volume of the *International Encyclopedia of Comparative Law*.¹²

David argues that, in general, the search for unification by means of international conventions has failed, and he explains this failure in terms of ideas of national sovereignty.¹³ He argues, however, that if unification is placed on a "simple doctrinal level" and limited to "defining the meaning of certain words, classifying legal rules, and fitting them into a uniform plan", then progress may be made towards unification by the work of legal scholars and of courts.¹⁴ David is in favour of a new *ius commune*, analogous to that of continental Europe before the nineteenth century. He states that a new *ius commune* could be created by means of conventions and model laws, though, of course, he doubts their efficacy

7 See the *Traité Élémentaire de Droit Civil Comparé* (1950), 141-185; "The Methods of Unification" (1968) 16 *Am. Jo. Comp. Law* 13; "*Pour une conception plus souple de l'unification internationale du droit*" (1969) 12 *Revue Romaine des Sciences Sociales, Sciences Juridiques* 51; "The International Unification of Private Law", ch. 5 in Mohr, *International Encyclopedia of Comparative Law*, Vol. 2 (1971); "*Unification du Droit et Arbitrage*" (1977) (G. Ph. Verhagen Lecture, Erasmus Universiteit Rotterdam); and "*Le Droit Continental, la 'Common Law' et les Perspectives d'un 'Jus commune' Européen*" in *New Perspectives for a Common Law of Europe* (ed. Cappelletti 1978), 113.

8 *Traité Élémentaire*, 4, and 141-185.

9 Watson, *op. cit.*, pp. 1-2 and note 4 thereon.

10 See, e.g., Kahn-Freund, "On Uses and Misuses of Comparative Law" in *Selected Writings* (1978), 294, 295-297.

11 "The Methods of Unification" (1968) 16 *Am. Jo. Comp. Law* 13, hereafter cited as "Methods".

12 "The International Unification of Private Law", *loc. cit.*

13 "Methods", p. 16 and pp. 19-22, and "International Unification of Private Law", e.g., pp. 141-150.

14 "Methods", p. 17.

in political terms.¹⁵ He argues that the creation of this *ius commune* is the task of legal scholars. He states that legal theory created national law and that it is for legal theory to create a modern *ius commune* in the face of political indifference—

In the absence of specific legislative commands, judges and lawyers in the different countries must search together, as was done in the universities with respect to the *ius commune*, for solutions which appear best to serve the ends of justice and the development of international commerce.¹⁶

He concludes that—

Lawyers must be awakened to the conscience of the new world and must be instilled with an international spirit which has lain dormant during a century of retreat into national law. In this lies the task of comparative law.¹⁷

David is arguing that the task of comparative law is in fact that set out by the World Congress of 1900.¹⁸

The programme David sets out is clear. Scholars must carry out research into the varying systems of national law to identify the areas in which they differ and the areas in which they correspond. By mapping out the areas of difference and those of correspondence, it should be possible to identify some common core of all the legal systems which could function as a *ius commune* created by scholars and judges which would serve to give a unity—if a limited one—to law around the globe. It should be noted that implicit in this is the assumption that there are certain fundamental concepts underlying all the systems of law of the world.

II

In a recent book based on his Tagore Law Lectures, Professor David has taken the opportunity to put his views on the role of jurists into practical effect. His book is entitled *English Law and French Law: A Comparison in Substance*.¹⁹ David states that his purpose is—

. . . to consider a variety of branches of the law and to investigate in such branches what is, in England and in France, the present state of the law and which differences are to be noted there between the two systems; and it is also to consider what is the prospect of seeing the oppositions of older times be attenuated or disappear in a world where international relations call for more uniformity than ever.²⁰

Considering the general plan for comparative law which David has

15 "Methods", pp. 21–22. As regards model laws, it is worth remembering that similar words may be interpreted differently by different national courts and thus be applied differently. See Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law" in *New Perspectives for a Common Law of Europe* (ed. Cappelletti 1978), 195–233, at pp. 205–207.

16 "Methods", p. 26.

17 "Methods", p. 27.

18 See fn. 2 *ante*.

19 (1980).

20 *English Law and French Law*, Introduction, p. 10.

elaborated over the last few years, it is instructive to examine this book for the light it sheds on David's contention that comparatists ought to be utilising the "comparative method" to create a new *ius commune*.

Comparative study of foreign legal systems is known to be fraught with problems: problems of terminology, of comparability, of superficiality.²¹ In an attempt to avoid many of these problems, it has become common to adopt a functionalist approach and to try to determine how various legal systems deal with similar social circumstances or problems. Such a functionalist approach tends to emphasise law in action: law as a process rather than as an abstract conceptual system. Even so, it is still generally necessary to describe the structure of the particular legal system and to explain its functioning so as to render comprehensible any account of any particular branch of the law. Professor David, despite the subtitle of his book, devotes—and rightly so—a great deal of attention to delineating and analysing the legal systems of France and England. This is necessary to provide a foundation for the rest of his study. It is proposed here to examine certain aspects of David's discussion of the two legal systems, firstly to demonstrate the general inadequacy of his treatment and, secondly, to assess whether his failure has any implications on a theoretical level for his overall plan of creating a *ius commune*.

David's primary thesis is that English law is a law of remedies while French law is a law of rights. He explains this difference on the basis of historical development and the ground covered is what one would expect.²² More controversially, David claims that continental lawyers are "deeply shocked" by the English dichotomy—his term—between "law" and "equity": he states that for continental lawyers a notion of equity or justice is implicit in law.²³ In fact, David here comes close to arguing that continental lawyers are still devotees of the natural law school of legal philosophy.²⁴ It is true that, from 1900 onwards, French lawyers have freed themselves from the dogmatism of the exegetical school, largely under the influence of the proponents of the *libre recherche* method, notably Gény; but it is doubtful if French lawyers should be described as being any less devoted to legal positivism than are those of England.²⁵

Professor David's description of equity as being designed to temper the rigours of the common law is a reasonably accurate description of equity's historical origin, but it is very doubtful if one should still attribute this function to equity, even though the distinction still has

21 See, e.g., Watson, *Legal Transplants* (1974), 10–15; Kahn-Freund, "Comparative Law as an Academic Subject" in *Selected Writings* (1978), 275, at 285–290; and F. H. Lawson, "The Field of Comparative Law" in *Selected Essays*, vol. 2, p. 2.

22 The different methods of legal education in the two countries, the forms of action in England and the like; see *English Law and French Law*, 1–15.

23 *Ibid.*, p. 7.

24 *Ibid.*, pp. 6, 7, 10, 11 and 13.

25 See Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif* (2nd ed. trans. by Mayda, 1963).

practical consequences.²⁶ In the eighteenth century, the Scottish jurist and philosopher, Lord Kames, in his *Principles of Equity*, made the same mistake as David, stating that English equity was intended to abate the rigours of the common law.²⁷ Blackstone was quick to correct Kames, and provided a lengthy refutation of Kames's view. Blackstone thus justified his long refutation of Kames—

I have been tempted to go so far, because the very learned author to whom I have alluded, and whose works have given exquisite pleasure to every contemplative lawyer, is (among many others) a strong proof how easily names, and loose or unguarded expressions to be met with in the best of our writers, are apt to confound a stranger; and to give him erroneous ideas of separate jurisdictions now existing in England, which never were separated in any other country in the universe.²⁸

Blackstone stated that, in his day, the difference between the equity and common law jurisdictions lay—

... in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief.²⁹

Blackstone's criticism of Kames could be applied to David with even more force, given the fusion of equity and common law procedure in the late nineteenth century. Baker points out that nowadays the Chancery jurisdiction requires very certain rules because of the nature of the work therein; and, while equity has become law and moved away from broad notions of justice, the common law has become more influenced by such broad notions of justice.³⁰ He refers to Lord Denning, the Master of the Rolls, who, in a recent case, said: "It is common lawyers who now do equity!"³¹

Professor David pays considerable attention to the codified form of much of French law, and much of what he says is illuminating and of profit to the reader.³² He stresses the recent nature of much of codification on the Continent and argues that the differences in methods of legal reasoning between French and English lawyers arise, not so much from the existence of codes, but rather from different traditional attitudes to statute law and case law. He argues that French law and English law have different conceptions of a legal rule: in French law a legal rule is—he argues—viewed as existing outwith the legal system, being formulated by scholars and legislators, whereas in English law a legal rule has

26 On the history of equity and common law, see Baker, *An Introduction to English Legal History* (2nd ed. 1979), 83–99.

27 Henry Home, Lord Kames, *Principles of Equity* (1st ed. 1760). Kames was a judge and a leading member of the Scottish *Aufklärung*.

28 *Commentaries on the Laws of England*, vol. 3 (1st ed. 1768), 441. The refutation covers pp. 430–441. I used the University of Chicago facsimile of the 1st edition in four volumes of 1765–1769.

29 *Ibid.*, p. 436. Blackstone was well aware of the historical development of the equity jurisdiction of the Chancery, but was concerned to give the modern view: see *ibid.*, pp. 431–436. He was also concerned to refute older English authors.

30 Baker, *op. cit.*, p. 99.

31 *Hill v. C. A. Parsons and Co. Ltd.* [1971] 3 All E.R. 1345, 1359.

32 *English Law and French Law*, 16–26.

traditionally been viewed rather more narrowly as deriving from particular cases.³³

The relative importance of case law in France and England is a contentious subject, and David merely gives his own view. His view of the difference between England and France in this respect does seem overly-based on a rather static view of the two legal systems, in so far as he stresses the *theoretical* differences between *jurisprudence constante* and binding precedent, rather than considering practice in both countries. Thus, in the *Encyclopédie Dalloz*, it is stated that—

*On peut dire sans paradoxe que la cour de cassation a plus de respect pour les arrêts de ses chambres réunies que pour la loi elle-même, car s'il lui arrive d'altérer ou de modifier la loi sous couleur de l'interpréter, elle n'abandonne jamais la jurisprudence créée par un arrêt des chambres réunies.*³⁴

The nature of the doctrine of precedent in English law is problematic; and it would be inappropriate to deal with all the difficulties here, but the following words of the late Sir Rupert Cross are accurate and worth bearing in mind in this respect—

English case law is not the same as *la jurisprudence*, but it is a mistake to suppose that our judges permanently inhabit a wilderness of single instances.³⁵

Professor David supposes that they do.

David states that in civil law countries codification “is regarded as inaugurating a new start in the development of the law”.³⁶ In many ways this is, *in strict theory*, correct for France, though it may be pointed out that the *loi* of 30 ventose, an *XII* seems to have omitted to abolish the *droit intermédiaire*, which presumably could have been applied, in theory, if not in practice, in areas not covered by the *Code civil* of 1804. Two points arise from this—

1. Does codification *necessarily* entail a “new start”?
2. Does codification *historically* produce a “new start”?

33 *Ibid.*, pp. 19–26. David makes the same point, though argued more fully, in his earlier *French Law: its Structure Sources and Methodology* (trans. Kindred 1972), 76–83. David's point about the historically different attitudes of Continental and English lawyers to case-law is, at the least, arguable. See Gorla, “La ‘*Communis Opinio Totius Orbis*’ et la Reception Jurisprudentielle du Droit au cours de XVIe, XVIIe et XVIIIe Siècles dans la ‘*Civil Law*’ et la ‘*Common Law*’” in *New Perspectives for a Common Law of Europe* (ed. Cappelletti 1978), 45–71. Modern historical research is tending to show that differences between the common law and civil law methodologies prior to codification have been exaggerated, because of over-emphasis on civilian doctrinal writings.

34 *Encyclopédie Dalloz*, v. iii, p. 22, para. 26, found quoted in Cross, *Precedent in English Law* (3rd ed. 1977), 15–16, note 2.

35 Cross, *op. cit.*, p. 16. Sir Rupert Cross develops this in his text at pp. 16–17, where he explains the practical effect of the theoretical difference. He points out that English appellate courts often lay down rules on quantum of damages to be followed by lower courts, which would be unthinkable in France. See pp. 12–17 generally for an excellent brief account of differences between the French and English doctrine of precedent.

36 *English Law and French Law*, 22.

The French code of 1804 became, and remains, the archetype of nineteenth-century civil law codification, and the attention understandably focused on it has perhaps detracted from the study of other nineteenth-century codes. The most obvious example of a code which did not abrogate all prior law is the *Civil Code of Lower Canada* of 1866: this code would appear to be an authentic code in the Napoleonic tradition, though it leaves open the possibility of appeal to pre-Code law.³⁷ That this is so has led one French-Canadian lawyer to remark that—

... il n'y a pas, à proprement parler de droit ancien ni de droit nouveau en cette province.³⁸

Article 2613 of this Code states thus—

The Laws in force at the time of the coming into force of this code are abrogated in all cases:

In which there is a provision herein having expressly or impliedly that effect;

In which such laws are contrary to or inconsistent with any provision herein contained;

In which express provision is herein made upon the particular matter to which such laws relate. . . .³⁹

Article 2615 is as follows—

If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded. . . .⁴⁰

This demonstrates that there is nothing inherent in the nature of a civil code which requires it *necessarily* to constitute a “fresh start”. It is important to stress this, because Professor David’s words could be interpreted so as to suggest he would answer in the affirmative the first question set out above.⁴¹ Some writers have seriously suggested that, for a civil code to be a “true code”, whatever this means, it necessarily has to bring about a complete rupture with the past. Brierley, in his study of the Quebec Code of 1866, because of the Code’s not making a break with the past, felt the necessity of arguing that the Code was in fact an authentic civilian code and not a mere consolidation of the laws.⁴² In the continuing controversy over the early legal history of Louisiana, it has often been alleged that the fact that the promulgation of the *Digest of the Civil Laws*

37 See Brierley, “Quebec’s Civil Law Codification” (1968) 14 *McGill L.J.* 521, at pp. 554–565.

38 Mignault, *Le Droit Civil Canadien* (1895), vol. i, 52.

39 The last paragraph of article 2613, omitted here, contains a transitional provision.

40 The last paragraph of article 2615, omitted here, refers to articles which change the law.

41 I.e. “Does codification *necessarily* entail a ‘new start’?”

42 Brierley, *op. cit.*, 554–565. He concludes that “Codification . . . is not in its essence a technique for bringing about a revolution in the content of the law.”

of the *Territory of Orleans* of 1808 does not seem to have resulted in the abrogation of all prior law means that *of necessity* the *Digest* is not a "true code".⁴³ Thus, though I would not suggest that Professor David himself considers codification as necessarily constituting a "new start", it is worth belabouring the point that the first question set out above should be answered in the negative because of the uncertainty that exists on this matter.

To turn now to the second question, it would seem that few codes historically have constituted a complete break with the past. Codes may explicitly preserve the prior law as did the *Civil Code of Lower Canada* of 1866. Codes will generally be constructed, at least in part, out of existing legal materials: this is so for the *Code civil des français*.⁴⁴ Continuity of legal tradition is also important, and practice in this respect may confound theory. In this respect, it is useful to look at French legal history after the promulgation of the *Code civil*.

The French exegetical school considered that their exposition of the law should be guided by the articles of the *Code* alone. One is reminded of Beugnet's famous aphorism—

*Messieurs, je n'enseigne pas le droit civil; je ne connais que le code Napoléon.*⁴⁵

The theory may have been that simple exegesis of the *Code* sufficed to solve any problem; the practice seems to have been different. It is instructive here to consider some of the early commentaries on the *Code civil*. The articles of the *Code civil* of 1804 are terse—indeed epigrammatic—in style. As Daube points out, simplicity and brevity do not necessarily coincide with intelligibility and accuracy.⁴⁶ If one examines one of the first commentaries on the new code, Maleville's *Analyse Raisonné de la discussion du Code Civil au Conseil d'État*,⁴⁷ one discovers that Maleville's discussion of the articles is shot through with ideas drawn from the *ancien droit*. In fact, all early commentators view the *Code civil* through a filter provided by the *ancien droit*. It is useful to examine one specific example. DeLaporte and Riffé-Caubray commented on the *Code civil* in a multi-volume work entitled *Les Pandectes Françaises*. Article 146 of the *Code* states that consent is a requisite for marriage. Article 148 states that lack of consent or error as to person are grounds for annulling a marriage. In their commentary on article 146, DeLaporte and Riffé-Caubray ex-

43 Consider the following remark by Dargo in his *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (1975), 157: "A code . . . replaces prior law and itself becomes the definitive and final statement of the law for purposes of adjudication. Despite some formal resemblances to a modern civil code, therefore, the *Digest* of 1808 lacked the essential element of a genuine work of code law. . . ."

44 See Esmein, "L'Originalité du Code civil," in *Le Code Civil, 1804–1904 Livre du Centenaire* (1969) (reprint of 1904 Paris edition), vol. i, 5–21.

45 Found quoted in, e.g., David and Brierley, *Major Legal Systems in the World Today* (2nd ed. 1978), 3, and note 3 thereon.

46 Daube, "The influence of Interpretation on Writing" (1970) 20 *Buffalo L. Rev.* 41, 43–46.

47 Jacques de Maleville (1st ed. 1805; 2nd ed. 1807). Maleville's work places the codal articles in context.

plain how violence, seduction and error vitiate consent: in this they follow the *ancien droit*, the *Code civil* not mentioning such details.⁴⁸

It is only natural that early commentators should so have acted: they had to make sense of the lapidary texts of the *Code civil*, and the *ancien droit*, in which they had been trained, provided them with aids to interpretation. Indeed, it would not be an exaggeration to state that the *Code civil* in many respects presupposed a knowledge of the *ancien droit*. In 1826 Fenet published an edition of the *Code civil* with, after each article, summaries of, and references to, relevant passages of *Pothier*.⁴⁹ Similarly, the pre-Revolutionary collection of jurisprudence by Guyot went through several editions, by Merlin, after the promulgation of the 1804 *Code*, with the addition of new passages in the text to take account of the *Code* and subsequent developments.⁵⁰ In the middle of the nineteenth century it was still thought useful to bring out editions of *Pothier* with references to relevant articles of the *Code civil* in footnotes.⁵¹

Clearly there is considerably more continuity than Professor David admits. By emphasising the *theory* behind codification as developed by commentators of the exegetical school in France, Professor David has ignored the fact that the practice was rather different.

III

Considerable attention has been devoted to Professor David's recent book in order to highlight the problems with his programme for the creation of a new *ius commune* by comparative legal scholars. To compare the legal systems of England and France, David has had to construct two simplified models: this is necessary to avoid too great a degree of detail which can render comparison impossible. Rather than being models simplified to facilitate comparison, Professor David's outlines of the two legal systems tend towards being caricatures. There are two aspects to this.

First, Professor David relies on an overly-simplified and static model of the law. He relies excessively on the "official" theory of how the legal systems of France and England work. He uses no insights from the work of sociologists of law, or indeed of the Scandinavian or American

48 DeLaporte and Riffé-Caubray, *Les Pandectes Françaises* (18 vols. 1803–1817), vol. iii, 141–154.

49 Fenet, *Pothier Analysé dans ses Rapports avec le Code Civil, et Mis en Ordre sous Chacun des Articles de ce Code* (1st ed. 1826; 2nd ed. 1829). It was Fenet who collected together all the preparatory works involved in the compilation of the *Code*.

50 Guyot, *Répertoire Universel et Raisonné de Jurisprudence etc.* (1st ed. 1775–1783; 2nd ed. 1784–1785; 3rd ed. by Comte Merlin, 1807–1808; 4th ed. 1812–1815; 5th ed. 1827–1828). The 3rd to the 5th editions are normally described as Merlin's *Répertoire etc.*

51 I am thinking here of the Bugnet editions of 1845–1848 and 1861–1862, entitled *Oeuvres de Pothier, annotées et mises en corrélation avec le Code civil et la législation actuelle*. There were numerous ordinary editions of *Pothier* during the nineteenth century.

legal realists, to shed light on the actual operation of either the French or English legal systems. At the level of doctrine, he stresses official theory to the detriment of practice: he accepts without question that the *Code civil* of 1804 constituted the rupture with the past that the exegetical school of jurists claimed it did. Further, he seems to misunderstand English equity. Though David's mistake may be understandable, he would have done well to ponder on Francis Bacon's words on unification of Scots and English law at the start of the seventeenth century, when Bacon considered that it would be best for Scots lawyers and English lawyers to expound their own systems for purposes of comparison to make obvious correspondence and differences, because otherwise English lawyers and Scots lawyers could easily misunderstand each other's legal system.⁵²

Second, Professor David is largely expounding his own views on the French legal system. For example, when he argues that continental scholars utilise a mode of reasoning deriving from notions of natural law, and are concerned with ideas of justice in contrast to common lawyers' obsession with due process, he does acknowledge (in a footnote) that—

There are many schools of thought on the European Continent and the views expressed in this chapter will not be unanimously approved.⁵³

This highlights a basic problem with David's study of English and French law, and with his more general programme for comparative law: the vast divergence of doctrinal views.

IV

These particular points arising out of Professor David's recent book raise important considerations in relation to his general programme for legal unification. David has called for the creation of a new *ius commune* by scholars of comparative law: a *ius commune* analogous to that of Europe before the nineteenth century.⁵⁴ But if there is a major diversity of views as to the nature of *one* legal system, what possibility is there of a scholarly consensus sufficient to create a new *ius commune*?

The period before the rise of the national legal systems in the

52 "Certain Articles or Considerations touching the Union of the Kingdoms of England and Scotland: collected and dispersed for his Majesty's better service" in *The Works of Lord Bacon* (Bohn edition 1846), vol. i, 453, 457–458; and "A Preparation toward the Union of the Laws of England and Scotland", *ibid.*, pp. 641–647, at p. 642. See generally on this proposed union, Levack, "The Proposed Union of English Law and Scots Law in the Seventeenth Century" (1975) *Juridical Review* 97.

53 *English Law and French Law*, 7, note 4.

54 A point not of direct relevance, but worth mentioning nonetheless, is that Professor David's apparent assumption that the *ius commune* lasted until codification is, to say the least, highly arguable. It seems much more useful to accept the view that in the seventeenth and eighteenth centuries all over Europe national civil law systems were developing out of, and away from, the *ius commune*. See Coing, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries" (1972) *Juridical Review* 193.

eighteenth and nineteenth centuries was at least a period of general consensus as to the nature of law in continental Europe. There may have been differences between scholars over the *mos Italicus* or *mos Gallicus*; there may have been development from a deist to a secular natural law; but there was general consensus as to the nature and function of law, no doubt due to the common Roman law heritage of continental Europe, as guarded in the universities. David is correct in so far as he sees the *Code civil* of 1804 as signifying an important change. In many ways the *Code* was the product of eighteenth-century natural law while paradoxically it marked the shift to legal positivism:⁵⁵ the legal positivism which David identifies with the development of national laws.⁵⁶ But, even so, the nineteenth century was still a period of general ideological consensus among legal scholars: the dispute provoked by Savigny over the desirability of codification was not, in essence, about the *nature* and function of law but rather about the historical relationship between law and a particular people.⁵⁷ Further, despite the romantic nationalism of the nineteenth century, it was a century when many countries adopted and borrowed the laws of other countries; indeed, Zajtay points out that, to a very considerable extent, the French code played the part of a *ius commune* for the Latin peoples in the nineteenth century.⁵⁸

In this century, however, the scholarly consensus, as to the nature and function of law, has disappeared. Alongside the growth of the modern state has come a vast burgeoning of legislation on all matters. Law has taken on a more instrumental function and is viewed as providing a method of managing the economy, of relieving poverty, of allocating resources. This new role for law has increased ideological confusion. There is a plethora of approaches ranging from those of Marxists to those of Hayek or Friedman. David assumes that unification is a technical matter capable of being managed by lawyers and legal scholars acting together; but if there is no general consensus as to the nature and function of law, the chances for such a unification by creation of a modern *ius commune* by scholars and judges would seem to be slight.

For David's scheme to be capable of being effective, it must be assumed that underlying all legal systems there are certain fundamental concepts which are both discoverable and everywhere the same. This seems doubtful⁵⁹ and the ideological differences already indicated would render next to impossible the search for, and agreement on, such fundamental concepts which David assumes could constitute a modern *ius commune*.

55 On this shift, see Arnaud, *Essai d'Analyse Structurale du Code Civil Français* (1973), 44-45, where Arnaud traces a move from natural law to positivism in the very development from the *Projet de l'an VIII* to the 1804 *Code civil des français*.

56 "Methods", pp. 24-25.

57 For a recent account of Savigny's work, see Stein, *Legal Evolution. The Story of an Idea* (1980), 56-65.

58 Zajtay, "La Permanence du Droit Romain dans les Systèmes Juridiques Continentaux" (1966) 18 *Revue Internationale du Droit Comparé* 353, 359.

59 Or, at least, the agreed concepts would be of so general and abstract a nature as hardly to be promoting unification through the means of a new *ius commune*.

The recent debate over the transplantability of laws has some relevance here.⁶⁰ This debate has shown that much of law, within certain limits, has little necessary connection with any particular country. If, for the moment, one ignores the point made above about lack of consensus, this conclusion might lead one to suppose that David was correct and that the creation of a *ius commune*, as he proposes, would be possible. Paradoxically, the opposite is the case. The debate in fact demonstrates that factors other than those of a legal or technical nature operate to oppose transplantation and, presumably, ultimate unification: consider, in this respect, the opposition to unification of English and Scots contract law,⁶¹ or the fact that Louisiana is the only State of the Union not to have ratified the *Uniform Commercial Code*.⁶² What these two examples indicate is that much more is at stake than the simple doctrinal management of rules proposed by David would suggest. As Francis Bacon remarked—

... we see ... that *patrius mos* is dear to all men, and that men are bred and nourished up in the love of it; and therefore how harsh changes and innovations are.⁶³

Unification or harmonisation of certain areas of law, particularly commercial law, would seem desirable; but it is doubtful if this could be achieved by scholars and judges. I have focused here on scholarly creation of a new *ius commune* because the problems relating to such have been brought into high relief by Professor David's recent book. The requisite political will and political action, and the use of international conventions and model laws to create unity raise different problems outwith the scope of this paper.⁶⁴

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60 See Watson, *Legal Transplants: An Approach to Comparative Law* (1974). See also Watson, "Legal Transplants and Law Reform" (1976) 92 *L.Q.R.* 79 and "Comparative Law and Legal Change" (1978) 37 *C.L.J.* 313; Kahn-Freund, "On Uses and Misuses of Comparative Law" in *Selected Writings* (1978), 294, and his review of Watson, *Legal Transplants* in (1975) 91 *L.Q.R.* 292. See also Stein, "Uses, Misuses—and Non uses of Comparative Law" (1972) 72 *North Western University Law Review* 198. Cf. Gaudemet, "Les Transferts de Droit" (1976) 27 *L'Année Sociologique* 29; Allott, *The Limits of Law* (1980), 109–120 and Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law" in *New Perspectives for a Common Law of Europe* (ed. Cappelletti 1978), 195–233, at pp. 207–210.

61 See Watson, *Legal Transplants*, 96–7 and 101. See also his *Society and Legal Change* (1977), 102–3.

62 See, e.g., Watson, "Comparative Law and Legal Change", ante fn. 60, p. 327.

63 Bacon, "Certain Articles . . . etc." ante fn. 52, p. 457.

64 A very useful critique of unification may be found in Merryman, loc. cit., pp. 205–7. Merryman's general scepticism (see pp. 197–9), about the return to a *ius commune*, though stated as resting on different grounds from the argument in this paper, is one with which I find myself in sympathy.

* LL.B., Ph.D., Lecturer in Law, Queen's University, Belfast.